**Guidelines**

**for**

**Patent Infringement Determination (2017)**

**Beijing High People’s Court**

(The Chinese text of the Guidelines shall prevail in case of inconsistency)

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**I. Determination of Protection Scope of the Patent for Invention or Utility Model**

**(I) Principle of Interpretation for Determination of Protection Scope**

1. Patent validity principle. Until the declaration of invalidation of the patent alleged by the right holder, the rights thereof shall be protected, and no ruling or judgment shall be rendered on the grounds that the patent does not conform to the relevant conditions for grant of a patent as provided in the Patent Law and shall be declared invalid, unless otherwise specified in the Guidelines.

A duplicate copy of the Patent Register, or the patent certificate together with the receipt of annual patent fees of the year in which the lawsuit is filed, may serve as the evidence for validity of the patent.

2. Fairness principle. When interpreting the claims, full consideration shall be given to the contributions made by the patent to the prior art so as to reasonably delimit the protection scope of the claims and protect the interests of the right holder, and also given to the public notice function of the claims and the reliance interests of the public, and the contents that are under protection should not be interpreted to be within the protection scope of the claims.

The contents ineligible for patent protection include:

(1) A technical solution containing a technical defect to be overcome by the patent;

(2) A technical solution which, in its entirety, belongs to the prior art.

3. Eclectic Principle. The claims shall be interpreted on the basis of the technical contents contained therein, and a reasonable determination of the protection scope of the patent shall be made in light of the factors including the description and drawings, the prior art, the contribution made by the patent to the prior art, etc.; the protection scope of the patent shall not be limited to the literal meanings of the claims, nor shall it be expanded to the contents which a person with ordinary kills in the art can only envisage through creative labor after reading the description and drawings before the date of filling of the application for patent.

4. The principle of compliance with the object of invention. In the determination of the protection scope of the patent, technical solutions incapable of realizing the object and effect of the invention shall not be interpreted to be within the protection scope of the claims, that is, the technical solution which is determined by a person with ordinary kills in the art as still incapable of solving the technical problem of the patent or realizing the technical effect of the patent on the basis of the background art after reading all the contents of the description and drawings shall not be interpreted to be within the protection scope of the patent.

**(II) Objects To Be Interpreted**

5. In the trial of a case of dispute over infringement of a patent for invention or utility model, the protection scope of the patent shall be firstly determined. The protection scope of the patent for invention or utility model shall be determined on the basis of the contents defined by the technical features stated in the claims, including the contents defined by the technical features equivalent to the stated technical features.

In the determination of the protection scope of the patent, interpretation shall be made of the relevant claims alleged by the right holder as the right basis, and the technical features of the claims shall be divided.

6. Where there are two or more claims in the claim set, the right holder shall clearly state the specific claims in the complaint. Where the claims are not specified, or specified unclearly in the complaint, the right holder is required to make clarification; if after elucidation, the right holder makes no clarification before the close of the court debate, the court may rule to dismiss the lawsuit.

7. Where the right holder alleges to determine the protection scope on the basis of a dependent claim, the protection scope of the patent shall be determined on the basis of the additional technical features stated in this dependent claim along with the technical features stated in the claim which this dependent claim directly or indirectly refers to.

8. A technical feature refers to the minimum technical unit in the technical solution defined in a claim that is able to relatively independently perform certain technical function(s) and generate relatively independent technical effect(s). In a technical solution relating to a product, the technical unit generally refers to a component(s) of the product and/or the connecting relationship between the components of the product. In a technical solution relating to a process, the technical unit generally refers to a process step(s), or the relationship between the steps.

9. Before the first-instance judgment is made, where the claims alleged by the right holder are declared invalid by the Patent Reexamination Board (PRB) and the right holder fails to change the alleged claims timely, the court may rule to dismiss the lawsuit brought by the right holder based on the invalidated claims.

Where there is evidence proving that the PRB’s decision to declare the above claims invalid is revoked by a binding administrative judgment, the right holder may file a lawsuit separately on the basis of the above claims.

Where the right holder files a lawsuit separately, the time limit of action shall be counted from the date of service of the administrative judgment. Where there is evidence proving that the accused act still exists during the administrative action, the right holder can claim relevant rights when filing the lawsuit separately.

10. Where the party concerned institutes an appeal with the second-instance court as being not satisfied with the first-instance judgment and the claims on which the first-instance judgment is based were declared invalid by the PRB before the final judgment, the first-instance judgment generally shall be revoked to dismiss the lawsuit filed by the patent holder on the basis of the invalidated claims. However, under special circumstances, the court may rule to suspend the trial of the second-instance case at the request of the party concerned after taking such factors as evidence on record, technical difficulty of the patent in suit and the defendant’s grounds of defense into comprehensive consideration.

Where there is evidence proving that the PRB’s decision to declare the claims invalid was revoked by a binding administrative judgment and the right holder has filed a lawsuit separately, the court shall make a judgment with reference to the facts and evidence ascertained in the original first-instance judgment when no new facts are found.

**(III) Methods for Interpretation**

11. The determination of the protection scope of the patent shall be based on the claims in the version of patent announced and granted by the patent administration department under the State Council, or the claims determined by the legally effective decision on the request for invalidation and relevant administrative judgment on affirmation of the patent right. Where there is more than one version of claims, the ultimate valid version shall prevail.

12. The claims shall be interpreted from the perspective of a person with ordinary skills in the art.

A person with ordinary skills in the art, is a hypothetical “person” who is presumed to be aware of all the common technical knowledge and have access to all the technologies existing in the art prior to the filing date, and have capacity to apply all the routine experimental means prior to the filing date.

A person with ordinary skills in the art does not specifically refer to one person or one type of person, and cannot be labeled by reference to such specific standards like education background, professional title and rank. Where there is any disagreement arising from the party over whether a person with ordinary skills in the art is aware of some common technical knowledge and has the capacity to apply certain routine experimental means, evidence shall be provided.

13. There are three forms of interpretation of claims, including, but not limited to, clarification, remedy, and amendment in particular cases, that is, clarifying the meaning of a technical feature in a claim when the technical feature fails to convey clear technical contents; remedying the insufficiency in a technical feature of a claim when there are deficiencies in the technical feature in respect of understanding; amending the meaning of a technical feature in a claim in particular cases, such as when contradiction exists between technical features.

14. The technical contents as conveyed by all the technical features stated in the claim generally shall be treated as an entire technical solution. The technical features in the preamble portion and the characterizing portion of independent claims, as well as in the referencing portion and the limiting portion of dependent claims shall define the protection scope.

Where a claim includes two or more parallel technical solutions, each parallel technical solution shall be separately determined as an entire technical solution.

15. For the purpose of interpreting a claim, reference can be made to the contents presented in the description and drawings of the patent, relevant claims in the claim set, other patents having a divisional relationship with the patent and the contents recited in the patent examination dossiers and effective legal documents during the granting and affirming (invalidation and following appeals) procedures of the abovementioned patents.

Where the meaning of the claim still cannot be clearly determined by resorting to the abovementioned means, interpretation may be made by referring to public literature such as reference books, textbooks, etc., and to the conventional understanding by a person with ordinary skills in the art.

The patent examination dossiers herein include the written materials submitted by the patent applicant or patentee, office actions, interview records, records of oral proceedings, effective decisions on reexamination and invalidation issued by patent administration department under the State Council and PRB in the procedures of examination, reexamination and invalidation.

16. Where there is any inconsistency or contradiction between the claims and the description of the patent, obviously violating the provision of Article 26.3&4 of the Patent Law and thus resulting in that the description cannot be used to interpret the claims, the parties concerned shall be informed to resolve the dispute through the patent invalidation procedure. Where a party has initiated the patent invalidation procedure accordingly and applied to suspend the trial of the present lawsuit, the court may rule to suspend the lawsuit.

Where the party concerned clearly rejects to resolve the dispute through the patent invalidation procedure, or fails to file a request for patent invalidation within a reasonable time limit, in accordance with the patent validity principle, the protection scope shall be determined according to the literal meaning of the claims. Provided that a person with ordinary kills in the art, by reading the claims and the description and drawings, can attain a specific, definite and sole and only interpretation of implementation of the technical features claimed for protection, misrepresentation in the claims shall be clarified or amended based on this interpretation.

Where the protection scope of the patent cannot be determined according to the preceding paragraph, the court may decide to reject the plaintiff’s claims.

17. When construing the claims and determining the protection scope of the claims recited in the claim set, it can be presumed that the protection scope of an independent claim is different from that of its dependent claims. The protection scope of the independent claim is larger than that of its dependent claims, and the protection scope of a preceding dependent claim is larger than that of a subsequent claim dependent on the preceding one, unless a person with ordinary kills in the art could obtain a contrary interpretation of the claims according to internal evidence such as the description and drawings of the patent, and the patent examination dossiers.

18. In respect of a functional technical feature in a claim which is represented in terms of function or effect, the content of this technical feature shall be determined by referring to the specific mode for achieving the functions or effects as disclosed in the description and drawings and to the equivalents thereof.

A functional technical feature refers to a technical feature in a claim which defines the structure, composition, material, steps, conditions or the relationship therebetween by the function they perform or the effect they achieve in the invention-creation.　　Those falling within the following circumstances shall not be identified as functional technical features:

1. Technical features which are described in terms of functions or effects and have become technical terms that are well-known among persons with ordinary skills in the art, or which are described in terms of functions or effects and through which the specific mode for achieving the functions or effects can be directly and definitely determined by only reading the claims;
2. Technical features which are described in terms of functions or effects, and which are also described in terms of structure, compositions, material, steps, conditions, etc.

19.　In the determination of the content of a functional technical feature, the functional technical feature shall be defined as the corresponding features of structure and steps disclosed in the description and drawings that are indispensable for achieving the said function and effect.

20. Where a process claim of a patent defines expressly the sequence of steps, the steps per se and the sequence of steps shall have definitive effect on the protection scope of the patent; where a process claim of a patent does not contain express definition on the sequence of steps, this shall not serve as an excuse for not taking into account the definitive effect the sequence of steps has on the claim, and determination shall be made as to whether the steps shall be carried out in a specific sequence from the perspective of a person with ordinary skills in the art by referring to the description and drawings, the entire technical solution presented in the claim, the logic relationship between steps and the patent examination dossiers.

21. The technical features which define the product by the preparation method function to delimit the protection scope of the patent. Where the preparation method for an accused product is neither identical nor equivalent to the method of the patent, the court shall determine that the accused technical solution does not fall within the protection scope of the patent.

22. Where a claim of a patent for utility model contains any non-shape, non-structure technical feature, the technical feature shall function to delimit the protection scope of the patent.

A non-shape, non-structure technical feature refers to a technical feature stated in a claim of a patent for utility model, which does not belong to the shape, the structure or the combination thereof, such as the use, manufacturing process, manner of use, composition (content of components, proportion), etc.

23. Where a claim of a patent for product invention or utility model does not define the field of application or the use, the field of application or the use generally does not function to delimit the protection scope of the patent.

24. Usage environment features incorporated into the claims function to delimit the protection scope of the patent. Where the accused technical solution is applicable under the usage environments recited in the claims, it shall be determined that the accused technical solution possesses the usage environment features stated in the patent claims. The actual use of the environment features in the accused technical solution is not the prerequisite. Nevertheless, where the patent documents explicitly define that the technical solution is applicable merely under the usage environments and there is evidence proving that the accused technical solution is applicable under other usage environments, the accused technical solution does not fall within the protection scope of the patent.

Where the accused technical solution is not applicable under the usage environments defined by the usage environment features in the claims, it shall be determined that the accused technical solution does not fall within the protection scope of the patent.

Different from the subject matter, usage environment features refer to technical features in a claim which are used to describe the background or conditions under which the invention or utility model applies and which are in connection or cooperation with the technical solution.

25. Where technical contents contained in the subject matter, such as the field of application, use or structure, have an effect on the technical solution protected by the claim, the technical contents function to delimit the protection scope of the patent.

The subject matter refers to an abstract generalization of the technical solution constituted by all the technical features contained in the claim and a simple name of the technical solution of the patent. The technical solution generalized by the subject matter needs to be embodied by all the technical features of the claim.

26. A claim that is written in a “consisting of” format is a closed-ended claim, and generally shall be interpreted as not including the structural components or process steps that are not stated in the claim.

The compositions in a closed-ended claim in pharmaceutical and chemical fields jointly work based on their respective characteristics and can achieve a particular technical effect without other substances, except for the claims regarding Chinese herbal compositions.

27. Where the description provides an explanation of a technical term which is different from the meaning of this technical term as it is in common use, the explanation provided by the description shall apply.

Where a technical term is endowed with other meaning before the occurrence of the accused act, this technical term shall be interpreted as the meaning adopted on the filing date of the patent.

28. A self-coined word used by the patentee in the patent documents shall be interpreted according to the particular meaning in the description. If the description fails to provide a definite definition, the self-coined word shall be understood in the relevant context of the description and interpreted as a meaning that most complies with the object of the invention. If the protection scope of the claims cannot be determined as the patentee fails to define the self-coined word in the description and meanwhile a person with ordinary kills in the art is unable to interpret it clearly according to the claims and in the context of the description, the court shall rule to reject the plaintiff’s claims.

29. Under normal circumstances, identical terms in the patent documents shall be interpreted as having the same meaning. Different terms are presumed to have different meanings, unless it can be determined that the different terms have the same meaning according to the description and conventional understanding of a person with ordinary kills in the art.

30. The drawings of the description function to supplement the written portion of the description by graphs, so as to enable a person with ordinary kills in the art to intuitively and vividly understand each technical feature and the entire technical solution of the invention or utility model. Only the technical content that can be directly and unambiguously determined from the drawings by a person with ordinary kills in the art after reading the claims and description can be used to interpret the technical features in the claim.

The contents presumed from the drawings, or the size or relationships that are not literally specified but measured from the drawings shall not be determined as the contents of the relevant technical feature.

31. Reference signs can be used to assist in understanding the technical solution. Where a claim refers to reference signs, the technical features in the claim shall not be defined by the particular structure indicated by the reference signs.

32. Patent claims are generally a reasonable generalization made on the basis of embodiments disclosed in the description or drawings. Embodiments are merely examples of the technical solution within the protection of the claims and are preferred modes for achieving the invention or utility model as deemed by the patent applicant. The protection scope of a patent shall not be restricted by the particular embodiments disclosed in the description, except in the following circumstances:

1. claims are in essence the technical solutions as presented in the embodiments;
2. claims contain functional technical features.

33. The abstract is intended for providing technological information and facilitating the public’s search, but it cannot be used for determining the protection scope of the patent or for interpreting claims.

34. Where misprints in the patent documents affect the determination of the protection scope of the patent, correction may be made on the basis of the patent examination dossiers of the patent.

Obviously wrong or ambiguous grammar, words, punctuations, graphs, signs, etc. in the claims, description and drawings, of which a sole and only understanding can be acquired from the claims, description and drawings, shall be determined based on the sole and only understanding.

**II Determination of infringement on the patent for invention and utility model**

**(I) Rule and method for comparing technical features**

35. All elements rule. The all elements rule is the basic principle to judge whether a technical solution infringes the invention patent or utility model patent. To be specific, in the determination as to whether the accused technical solution falls within the protection scope of the patent, an examination shall be conducted on all the technical features stated in the claim alleged by the right holder, and a comparison shall also be conducted between all the technical features stated in the claim and all corresponding technical features in the accused technical solution one by one. Where the accused technical solution contains the technical features that are identical or equivalent to all the technical features of the claim, it shall be determined that the accused technical solution falls within the protection scope of the patent.

36. In the determination of infringement, the patented product provided by the party concerned shall not be compared directly with the accused technical solution, but the patented product can be used to facilitate the understanding of the relevant technical features and technical solution.

37. Where both the right holder and the accused infringer hold patent rights, their patented products or the claims of their patents cannot be directly compared in general.

**(II) Identical Infringement**

38. Where the accused technical solution comprises corresponding technical features that are identical to all the technical features stated in an entire technical solution of the claim, literal infringement will be found, namely infringement in literal sense.

39. Where the technical features stated in the claim are features in upper level term, and the corresponding technical features of the accused technical solution are corresponding features in lower level term, it shall be determined that the corresponding technical features of the accused technical solution constitute identical technical features.

40. Where the accused technical solution, in addition to comprising all the technical features of the claim, has any new technical feature added thereto, it still falls within the protection scope of the patent, unless the new technical feature is definitely excluded from the patent documents

41. Where the accused technical solution, in addition to comprising all the technical features in the close-ended claim, has any new technical feature added thereto, it shall be determined that the accused technical solution does not fall within the protection scope of the patent, except for the circumstances where the added technical feature belongs to a conventional amount of impurities which are inevitable in a close-ended claim directed to compositions in the pharmaceutical and chemical fields.

42. In respect of a claim comprising　functional features, compared with the structural and step features prescribed in Article 19 of the Guidelines, the corresponding structural and step features of the accused technical solution achieve the same function and generate the same effect by the same means, or, despite the differences, achieve the same function and generate the same effect by substantially the same means, and can be envisaged by a person with ordinary kills in the art at the filing date of the patent without making inventive effort, it shall be determined that the corresponding structural and step features are identical with the functional features.

When judging whether the structural and step features constitute identical features, the structural and step features shall be regarded as one technical feature, rather than be divided into two or more technical features.

43. Where the invention or utility model for which the patent is granted later belongs to improvement on the prior patent for invention or utility model, and where a claim of the later patent, in addition to comprising all the technical features in a claim of the prior patent, has any other technical feature added thereto, the later patent belongs to a dependent patent. Implementing of the dependent patent falls within the protection scope of the prior patent.

The patent in the following circumstances is a dependent patent:

1. The claims of the later product patent, in addition to comprising all the technical features of the claims of the prior product patent, have new technical features added thereto;
2. On the basis of the claims of the original product patent, new use that is unknown before is found；
3. On the basis of the claims of the original process patent, new technical feature is added.

**(III)Equivalent infringement**

44. In the event that literal infringement fails to be found in the determination of patent infringement, the court shall judge whether equivalent infringement is found.

Evidence shall suffice to prove that the accused technical solution constitutes equivalent infringement, and the right holder shall adduce evidence or make a detailed explanation.

45. The accused technical solution shall be determined to fall within the protection scope of the patent and equivalent infringement shall be found, when one or more technical feature(s) in the accused technical solution, though different in literal sense from the corresponding technical feature(s) in the claim, belong(s) to equivalent feature(s) of the latter.

Equivalent features refer to those which achieve substantially the same function and generate substantially the same effect by the means substantially the same as the technical features stated in the claim and can be envisaged by a person with ordinary skills in the art without making inventive effort.

In the judgment on equivalent features, the means is the technical content of the technical feature per se and the function and effect are the external characteristics of the technical feature, and the function and effect of the technical feature are decided by the means of the technical feature.

46. Substantially the same means indicates that the technical features of the accused technical solution are not essentially different from the corresponding technical features of the claim in terms of technical content.

47. Substantially the same function indicates that the technical features of the accused technical solution and the corresponding technical features of the claim perform substantially the same function in their respective technical solutions. The fact that the technical features of the accused technical solution have other functions as compared with the corresponding technical features of the claim shall not be considered.

48. Substantially the same effect indicates that the technical features of the accused technical solution and the corresponding technical features of the claim achieve substantially the same technical effect in their respective technical solutions. The fact that the technical features of the accused technical solution achieve other technical effects as compared with the corresponding technical features of the claim shall not be considered.

49. Being envisaged without making inventive effort refers to that a person with ordinary kills in the art can easily envisage that the technical features of the accused technical solution and the corresponding technical feature in the claim are mutually replaceable. The following factors shall be taken into account when making a judgment: whether the two technical features belong to the same or close technical categories; whether the two technical features follow the same working principles; whether the two technical features are mutually replaceable directly in a simple manner, that is, whether other parts need to be redesigned for the sake of the replacement between the two technical features, wherein simple adjustment of size and interface position shall not be regarded as a redesign.

50. In the determination of whether equivalent infringement is found, the court shall make a judgment in respect of means, function, effect, and whether inventive effort is required successively, wherein the judgment in respect of means, function and effect plays a primary role.

51. Replacement of equivalent features shall be replacement between specific and corresponding technical features instead of replacement between the entire technical solutions.

52. As for equivalent feature, it may be several technical features in the claim corresponding to one technical feature in the accused technical solution, or one technical feature in the claim corresponding to a combination of several technical features in the accused technical solution.

53. Replacement of equivalent features includes both replacement of distinguishing technical features in the claim and replacement of technical features in the preamble portion of the claim.

54. The time point for determining whether the technical features of the accused technical solution are equivalent to those of the claim shall be subject to the time when the accused act takes place.

55. Where there are more than one equivalent features in the claim and the accused technical solution, if the aggregation of the more than one equivalent features enables the accused technical solution to form a technical solution which has the technical concept different from that of the claim, or to achieve unexpected technical effects, equivalent infringement shall not be found in general.

56. In respect of a claim comprising functional features, compared with the structural and step features prescribed in Article 19 of the Guidelines, the corresponding structural and step features of the accused technical solution achieve the same function and generate the same effect by substantially the same means, which can be envisaged by a person with ordinary kills in the art during the period from the filing date of the patent in suit till the date when the accused act takes place without making inventive effort, it shall be determined that the corresponding structural and step features are equivalent to the functional features.

When judging whether the structural and step features constitute equivalent features, the structural and step features shall be regarded as one technical feature, rather than be divided into two or more technical features.

57. In respect of a claim containing a numerical range feature, the allegation of the right holder that a different numerical feature constitutes an equivalent feature generally shall not be supported, except that the different numerical feature belongs to the technical content appearing after the filing date.

Where the claim adopts such terms as “at least” or “no more than” to limit the numerical feature, and upon reading claims, description and drawings, a person with ordinary skills in the art deems that the technical solution of the patent particularly emphasizes the strict limitation effect of such terms on the feature, the allegation of the right holder that a different numerical feature constitutes an equivalent feature shall not be supported.

In respect of a claim of a utility model having a numerical feature, the allegation of the right holder that a corresponding numerical range in an accused technical solution constitutes an equivalent feature shall not be supported, except that the different numerical feature belongs to the technical content appearing after the filing date.

58. A technical solution which is only described in the description or drawings, but not included in the claim shall be deemed to have been abandoned by the patentee. The allegation of the right holder that this technical solution falls within the protection scope of the patent shall not be supported.

59. Where the accused technical solution belongs to a technical solution that is definitely excluded by the description or belongs to a technical solution stated in the background art, the allegation of the right holder of equivalent infringement shall not be supported.

60. In respect of the technical features which do not represent inventive steps or technical features formed through amendment in the claim of the invention or the technical features in the claim of the utility model, if the patentee clearly knows or is able to foresee the existence of alternative technical features at the time of filing or amending the patent application without incorporating the alternative technical features into the protection scope, the allegation of the right holder for incorporation of the alternative technical features into the protection scope under equivalent infringement shall not be supported in the infringement determination.

61. In the determination as to whether a technical feature in the accused technical solution is equivalent to a technical feature in the claim, the accused infringer may defend on the grounds that this equivalent feature has been abandoned by the patentee and the rule of estoppel shall be applied.

Estoppel refers to the prohibition of the patentee from reincorporating the abandoned content into the protection scope of the patent in determining whether equivalent infringement is found in patent infringement litigation, where the abandoned content is the protection scope abandoned by the patent applicant or patentee by means of restrictively amending the claim or the description or making observations in the patent prosecution or invalidation procedure.

62. The restriction or partial abandonment of the protection scope by the patent applicant or patentee shall be required for overcoming such substantial defects as lack of novelty or inventiveness, lack of essential technical features, lack of support of the claims by the description and insufficient disclosure of the description, which render an application unpatentable.

Where the right holder fails to explain the reason for amending the patent documents, it may be presumed that the amendment is made for the purpose of overcoming the substantial defects which render the application unpatentable.

63. The restrictive amendment to the protection scope of the claim or observations made by the patent applicant or patentee shall be expressly specified, and shall have been recorded in written statements, patent examination dossiers and effective legal documents.

Where the right holder can prove that the restrictive amendments made to the claims, description and drawings or observations made by the patent applicant or patentee in the patent prosecution and invalidation procedure are definitely negated, it shall be determined that the amendments or observations do not lead to the abandonment of the technical solution.

64. Estoppel shall be applied on the premise that the accused infringer files a request and furnishes the corresponding evidence in respect of the estoppel of the patent applicant or patentee.

In the event that evidence in respect of estoppel of the patent applicant or patentee has been obtained, the court may, in light of the facts ascertained and by applying estoppel, put necessary limit on the protection scope of the claim and determine reasonably the protection scope of the patent.

III. Determination of Protection Scope of Patent for Design

65. In the trial of a case of dispute over infringement of a design patent, the protection scope of the patent shall be determined first. The protection scope of a design patent shall be determined by the design incorporated in the patented product illustrated in the drawings or photographs, and the brief description and essential features of the design, as well as observations filed by the patentee in the procedure of invalidation and the procedure of litigation thereof, may be used for understanding the protection scope of the patent for design.

The real patented product provided by the party concerned in the litigation may serve as a reference for helping understanding the design, but not as a basis for determining the protection scope of the design.

66. Overall comparison principle. In the determination of the protection scope of a design, the entire design content constituted by the shape, pattern, color and other design elements displayed by the drawings or photographs representing this design in the announcement of grant shall be considered comprehensively, all the design features displayed by each view in the drawings or photographs shall be considered, and it is not allowed to consider only some of the design features and ignore others.

A design feature refers to the shape, pattern or their combination of a product, or the combination of the color with shape and/or pattern, which has relatively independent visual effect and has integrity and identifiability, i.e., the design of a certain part of the product.

67. The right holder may submit written materials explaining the essential feature of the design patent, and explaining the part of innovation of the design and the design contents thereof. Where the brief description states the essential feature, it can be used for reference.

An essential feature refers to the design feature distinguishing the design from the prior design and that can produce notable visual influence on a normal consumer.

68. Where the design patent claims for protection of colors, the colors claimed for protection shall be used as one of the design features in determining the protection scope of the design patent, that is, in the determination of infringement, the shape, pattern, color and combination thereof shall be comprehensively compared with the corresponding shape, pattern, color and combination thereof of the accused product.

69. Where the design patent seeks protection of colors, the right holder shall submit relevant evidence issued or recognized by the patent administration department under the State Council for determining the protection scope of the design. If necessary, a check shall be conducted via comparison with the colors recorded in the patent examination dossiers of the patent administration department under the State Council.

70. The size, material and internal structure of the product that have no impact on the overall visual effect shall be excluded from the protection scope of the design patent.

71. The protection scope of the patent for similar designs shall be determined by each independent design, respectively. Both the main design and each of the other similar designs may serve as the basis for determining the protection scope of the respective design patent.

72. Where the overall design of the products in set and each of the designs constituting the products in set have been displayed in the drawings or photographs in the design patent document, the protection scope of the patent shall be determined by design of each product constituting the products in set, respectively.

73. The protection scope of a graphical user interface design shall be determined by the product design views in combination with the essential feature.

The protection scope of a dynamic graphical user interface design shall be jointly determined by product design views that can determine the dynamic change process in conjunction with a description of the dynamic change process by the brief description.

IV. Determination of Infringement of Patent for Design

74. Where a design identical or similar to the patented design is incorporated in the product of the same or similar category of the product incorporating the patented design, the accused design shall be deemed to have fallen within the protection scope of the design patent.

75. In the determination of design infringement, a comparison shall be made on the basis of the drawings or photographs representing this design in the announcement of grant, instead of the real product incorporating the patented design submitted by the right holder, except for the case where this real patented product is completely identical to the product incorporating the design represented in the drawings or photographs in the patent announcement document, and where no party raises objection.

76. The determination of design patent infringement shall be conducted through comparison by means of direct observation from the visual sense of a normal consumer, instead of through comparison by virtue of magnifying lenses, microscopes and other tools. However, if the product design represented in the drawings or photographs as filed for a patent is amplified, the accused product shall also be correspondingly amplified in the comparison for determination of infringement.

77. In the determination of design infringement, an examination shall first be made as to whether the accused product and the product incorporating the design belong to the same or similar category of products.

The category of a graphical user interface design product shall be determined by a product using the graphical user interface.

78. Whether the products belong to the same or similar category shall be determined on the basis of the function, purpose of use and use condition of the product incorporating the design.

The purpose of use of the product may be determined by referring to relevant factors in the following order: the brief description of the design, the International Classification for Industrial Designs, the function of the product, the circumstances of sale and actual use of the product, etc.

Where the function, purpose of use and use condition of the design product and those of the accused design product do not overlap, the design product and the accused product are not products of the same or similar category.

79. The determination of infringement of a patent for design shall be based on sameness and similarity, rather than on whether causing confusion and mistakes in recognition in the sense of the Trademark Law.

80. The judgment on whether the design is the same or similar shall comply with the principle of comprehensive observation of the design features and comprehensive judgment of the overall visual effect, which means to make a judgment after one-by-one analysis and comparison of all the design features of the visual part of the patented design and the accused design and a comprehensive consideration of all the factors that may influence the overall visual effect of the product design.

The following circumstances usually have more influence on the overall visual effect of the design:

(1) The part of the product that is easier to directly observe in normal use as compared to other parts;

(2) The essential features of the design as compared to other design features.

In the comparison, an objective and comprehensive summary of the similarities and differences of design features between the design and the accused product can be made, the significance of the impact of each similarity or difference on the overall visual effect is determined one by one, and ultimately identification is made through overall observation and comprehensive judgment.

81. The judgment on whether the design is the same or similar shall be made according to the standard of the overall visual effect on the subject of judgment with the knowledge and cognitive capability of a normal consumer, rather than the observational capability of an ordinary designer of the design product or the actual purchaser of the product.

82. A normal consumer refers to a hypothetical “person” who is defined in terms of knowledge and cognitive capability. In the definition, the design space of the product of the same or similar category of the patented design on the filing date of the design patent shall be considered.

The knowledge and the cognitive capability of a normal consumer depend on the condition of the prior design. The party concerned shall allege the knowledge and the cognitive capability of a normal consumer on the basis of the condition of the prior design.

83. Upon judgment of whether the design is the same or similar, the party concerned may be requested to submit evidence to prove the design space and the prior design condition of the relevant design feature.

Design space refers to the degree of freedom of the designer in the creation of a specific product design. The design space is subject to the following conditions:

(1) the technical function of the product or its parts;

(2) the necessity of adopting the common features of this category of products;

(3) the degree of crowdedness of existing designs;

(4) other factors that may have an impact on the design space, such as economic factors (lower costs) and so on.

The more existing designs a certain design feature corresponds to, the more occupied the design space of the feature is, the smaller the design space is, the fewer alternative design solutions there are, and the greater impact the subtle differences will have on the overall visual effect; on the contrary, the fewer prior designs there are, the less occupied the design space of the feature is, the greater the design space is, the more alternative design solutions there are, and the subtle differences will not have significant impact on the overall visual effect.

The prior design condition refers to the overall condition of the design of products of the same or similar category known to the public at home and abroad prior to the filing date of the design patent and the specific condition of each design feature. Where there is evidence that the prior design has the same or substantially the same design as a design feature, the design feature has little effect on the overall visual effect of the product.

84. The accused design and the patented design shall be identified to be the same when there is no difference in overall visual effect between the two; and they shall be identified to be similar when there is no substantial difference in overall visual effect between the two. Specifically:

(1) The two shall be deemed to be the same when there is no difference between them in respect of the overall visual effect of shape, pattern, color, etc.;

(2) The two shall be deemed to be similar when they are not completely the same but are not significantly different in respect of the overall visual effect of shape, pattern, color, etc.;

(3) The two shall not be deemed to be the same or similar when they are not the same and are significantly different in respect of their overall visual effect of shape, pattern, color, etc.

85. In the judgment on sameness or similarity, design features determined by the function of the product shall not be taken into account.

Design features determined by the product function refer to the design features limitedly or uniquely determined by the function and formed regardless of aesthetic factors. The non-selectable design features that are specified by technical standards or have to be adopted in order to achieve mechanical mating relationships are functional design features.

86. In respect of a static graphical user interface design, comprehensive judgment shall be made by mainly considering the graphical user interface part of the product, and taking into account its relationship, such as the positional, proportional, and distribution relationship, with the rest part of the product, as well as the corresponding content in the accused design. If the graphical user interface design of the accused product is the same as or similar to the patented design and its relationship with the rest part of the product does not notably influence the overall visual effect, it shall be deemed that the accused design falls within the protection scope of the patent.

If the accused design contains the entirety of the static graphical user interface design, it shall be deemed to have fallen within the protection scope of the patent.

87. In respect of a dynamic graphical user interface design, if the views of the accused design and the dynamic graphical user interface design are the same or similar, the accused design shall be deemed to have fallen within the protection scope of the patent. In the specific judgment, the positional, dimensional and distribution relationships of the graphical user interface part and the rest part of the product shall also be taken into account.

If the accused design lacks views of some states such that a change process consistent with the patent design cannot be reflected, it shall be deemed that the accused design does not fall within the protection scope of the patent, unless a change process consistent with the patent design can still be uniquely determined.

If the accused design uses part of the dynamic graphical user interface design or its key frames, and the part or the key frames belong to essential features of the graphical user interface design, the accused design falls within the protection scope of the patent, unless the overall visual effect of the accused design is neither the same as nor similar to the dynamic graphical user interface design.

88. In respect of the design for a three-dimensional product, the shape usually has more influence on the overall visual effect, and the judgment on sameness or similarity shall concentrate on the shape; however, if the shape belongs to a usual design, the pattern and the color have more influence on the overall visual effect.

When the design feature of the non-graphical user interface is a usual design, the graphical user interface has more significant influence on the overall visual effect.

A usual design refers to the prior design, which is so familiar to a normal consumer that the mention of its name would remind him of that particular design. In the field of design products, the design feature adopted by each independent product manufacturer normally belongs to a usual design. A usual design generally has no notable influence on the overall visual effect of the design patent, except for the case where the combination of usual designs can bring unique visual effect.

89. In respect of the design for a plane product, pattern and color usually have more influence on the overall visual effect, and the judgment on sameness or similarity shall concentrate on the pattern and color.

90. In respect of the design claiming for protection of colors, determination shall first be made as to whether the design belongs to a usual design, and in the case of a usual design, judgment shall be made on the pattern and color alone; where the shape, pattern and color are all new designs, judgment shall be made on the combination of shape, pattern and color.

91. The replacement of opaque material for transparent material or transparent material for opaque material, which is only transformation of material feature and does not lead to any obvious change of the product design, shall not be taken into account in the judgment on sameness or similarity of design, unless the transparent material enables a change of the aesthetic feeling of the product design, and leads to a change of the overall visual effect on a normal consumer with regard to this product.

Where the accused product is engaged in a replacement of opaque material for transparent material, through which the internal shape, pattern and color of the product can be observed, the internal shape, pattern and color shall be regarded as part of the design of the product.

92. In respect of a design patent of a product of variable states, the various variable state views thereof shall all be incorporated into the protection scope. Where the accused design is the same as or similar to the design of each state in use as shown by the variable state views, it shall be deemed that the accused design falls within the protection scope of the patent. Where the accused design lacks the design of some of the states in use and is neither the same as nor similar to it, it shall be deemed that the accused design does not fall within the protection scope of the patent.

Reference views are usually used to indicate the purpose of use, the method of use or the place of use, etc. of the product incorporating the design, and cannot be used to determine the protection scope of the design patent of a product of variable states.

93. If the patent involved is similar designs, a design for products in set or the like which includes two or more independent designs, the right holder shall make clear the design claimed thereby. When two or more designs are claimed as the right basis, the relevant design content of the accused product shall be respectively and separately compared with each of the claimed designs.

Where the accused design is the same as or similar to one design in the similar designs or the design for products in set, it shall be deemed that the accused design falls within the protection scope of the patent.

94. In respect of the design patent of an assembled product with only one option of assembly, where the accused design is the same as or similar to the overall design of the assembled product in the assembled state, it shall be deemed that the accused design falls within the protection scope of the patent.

In respect of the design patent of an assembled product needless of assembly or with more than one option of assembly of its components, if the accused design is the same as or similar to the design of all the individual components thereof, it shall be deemed that the accused design falls within the protection scope of the patent; if the accused design lacks the design of some individual components or is neither the same as nor similar to it, it shall be deemed that the accused design does not fall within the protection scope of the patent, unless the design of these individual components does not notably influence the overall visual effect of the design of all the individual components.

95. Where the applications for design patent of both the patentee and the accused infringer have been approved and the filing date of the design patent of the patentee is prior to the filling date of the design patent of the accused infringer, if sameness or similarity is identified between the design of the accused infringer and the design of the patentee, it may be determined that the act of the accused infringer exploiting the design patent infringes the prior design patent.

96. Before the final judgment is made, if the design claimed by the right holder is declared invalid by the PRB, Articles 9 and 10 of the Guidelines may be referred to for handling.

**V. Determination of Acts of Patent Infringement**

**(I) Determination of Acts of Direct Patent Infringement**

97.　After the grant of the patent for an invention or utility model, unless it is otherwise provided in the Patent Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent for a design, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offer to sell, sell or import the product incorporating its or his patented design, for production or business purposes.

98. The act of exploitation prior to the publication date of the patent for invention or the date of announcement of the grant of the patent for utility model or design does not belong to an act of patent infringement.

From the publication date of the patent for invention until the announcement of the grant of the patent, that is, in the provisional duration of protection of the invention patent, the entity or individual exploiting this invention shall pay appropriate fees for exploitation to the right holder. The determination on the act of exploitation may refer to the laws and regulations applied in patent infringement.

Where the protection scope sought for by the applicant on the publication date of the patent is inconsistent with the protection scope of the patent upon the announcement of the grant of the patent, and the accused technical solution falls within both of the two scopes of protection, it shall be deemed that the accused infringer has exploited the invention in the provisional duration of protection. Where the accused technical solution falls within only one of the scopes of protection, it shall be deemed that the accused infringer does not exploit the invention in the provisional duration of protection.

99. Making an invention or utility model patent product refers to that the technical solution of the product stated in the claim is implemented, where the quantity and quality of the product have no impact on the determination of the act of making.

The following acts shall be deemed as acts of making the invention or utility model patent product:

1. The act of making the product by a different making process, except for the claim of product that is defined by a process;
2. The act of assembling components into the patented product.

100. The making of the design patent product refers to that the product incorporating the patented design illustrated in the drawings or photographs submitted by the patentee when filing for a patent application with the patent administration department under the State of Council is carried out.

101. The use of the invention or utility model patent product refers to the application of the technical function or the realization of the effect, of the technical solution of the product stated in the claim.

102. The use of the product infringing the patent for invention or utility model as a component or intermediate product to make another product shall be regarded as belonging to the use of the patented product.

103. The use of a patented process refers to that each step of the technical solution of the patented process stated in the claim is carried out, and the result of the use of this process shall not influence the determination as to whether it has constituted the patent infringement.

104. The use of the design patent product refers to the application of the function and technical performance of the product incorporating the design.

105. Where a sales contract of the product infringing the patent is formed under the law, the act shall be determined to constitute the sale of the product infringing the patent. Whether the ownership transfer of the product actually occurs generally does not influence the determination as to whether the sale is constituted.

The ownership transfer of the product infringing the patent by tying arrangement or other means for the purpose of obtaining commercial interests in disguised form also belongs to the sale of the product. So does the gift of the product infringing other's patent right for production or business purposes.

106. Where the product infringing the invention or utility model patent is used as a component or intermediate product to make another product, the sale of another product shall be regarded as the sale of the patented product, unless the physicochemical properties of the intermediate product are substantially changed during the manufacture.

The act of using the product infringing the design patent as a component to make another product and sell it shall be regarded as an act of selling the product incorporating the patented design, except where the product infringing the design patent only has technical functions in the another product.

By only having technical functions, it refers to that this component constitutes the internal structure of the ultimate product, and only has technical functions and effects, without generating any visual effect in the normal use of the ultimate product.

107. Prior to the actual occurrence of the act of selling the product infringing other’s patent right, the accused infringer’s expression of a will to sell the product infringing other’s patent right shall constitute an offer for sale.

The expression of a will to sell the product infringing other’s patent right, which is made by means of advertisement, display on the shopping window, exhibition online or at a trade fair, etc., shall be regarded as an offer for sale.

108. The use of the product infringing other’s patent right for rent shall be regarded as the sale of the patented product.

109. The import of a patented product refers to the act of transporting in space the product falling within the protection scope of the claims of the product patent, or the product directly obtained by the patented process or the product incorporating the patented design from overseas across the borders into the domestic territory.

110. The extension of a process patent to the product refers to that after the grant of a patent for process invention, no entity or individual may, without the authorization of the patentee, use, offer to sell, sell or import the product directly obtained by the patented process for production or business purposes, in addition to the disallowance to use the patented process for production or business purposes.

111. The product directly obtained by the patented process refers to the original product obtained by processing the raw materials and articles according to all the step features stated in the claims of the process patent to enable the occurrence of substantial changes of the raw materials and articles in structure or physicochemical properties.

The subsequent product obtained by further processing of the abovementioned original product, that is, the subsequent product made by processing the original product which is used as an immediate component or raw material, shall be regarded as the product directly obtained by using this patented process. Further processing of this subsequent product does not belong to the act of using the product directly obtained by this patented process.

112. A “new product” as provided for in Article 61 of the Patent Law refers to a product that is manufactured for the first time domestically and abroad, and this product, as compared to a product of the same class existing before the application date of the patent, has obvious differences in product component, structure, or quality, performance and function.

Where the product or the technical solution for making the product is known to the public domestically and abroad before the filing date of the patent, this product shall not be regarded as a new product as provided for in the Patent Law.

The right holder shall bear the burden of proof for determining a new product. Where the right holder submits evidences which preliminarily prove this product to be a new product as provided for in the Patent Law, the right holder shall be deemed to have fulfilled the burden of proof.

113. An “identical product” as provided for in Article 61 of the Patent Law refers to that the accused product and the original product directly obtained by exploiting the process for making the new product are not substantially different from each other in shape, structure or components, etc.

The right holder shall bear the burden of proof for determining whether it is the identical product.

114. In respect of the patent for use invention, the right holder shall prove that the accused infringer makes, uses, sells, offers to sell or imports the accused product for the purpose of the specific use of the patent.

115. During scientific research and experimentation, without the authorization of the patentee, acts like making, using, importing the relevant patented product, or using the patented process as a tool, means, etc., to carry out research experiments of other technology, or do research on business prospect of exploiting patented technical solution and so on, with the results having no direct relation with the patented technology, constitute the act of infringing the patent.

**(II) Determination of Acts of Joint Patent Infringement**

116. The implementation of the acts of patent infringement with conspiracy or with labor division and cooperation by two or more parties constitutes joint infringement.

117. Where an entrusting party, clearly knowing that another party's act constitutes patent infringement as provided for in Article 11 of the Patent Law, entrusts the another party to make the product or mark "supervision" on the product or involves similar participative behaviors, the acts of both the entrusting party and the entrusted party constitute joint infringement.

118. One, who clearly knows that another party's act constitutes patent infringement as provided for in Article 11 of the Patent Law, and abets or assists the another party in committing the act of patent infringement, is the joint infringer with the another party, and both parties shall be liable jointly and severally.

119. Where a party, clearly knowing that a certain product is a raw material, intermediate product, component or equipment specially used for implementing the technical solution of a patent in suit, without the authorization of the patentee, for production or business purposes, provides said product to another party who commits an act of patent infringement, the party's act of providing the specially used product constitutes the act of assisting another party in committing the act of patent infringement as provided for in Article 118 of the Guidelines, however, where the another party belongs to circumstances prescribed as in Article 130 of the Guidelines or items (3), (4), (5) of Article 69 of the Patent Law, the party shall bear civil liability.

The "specially used product" mentioned in the preceding paragraph shall be determined by the criteria whether the material, product, etc., has substantial meaning for implementing the technical solution of the patent in suit and has substantial non-infringing use, that is, if the corresponding material, product, etc., is indispensable for implementing the technical solution of the patent in suit and does not have another substantial non-infringing use except used in the patent in suit, the material, product etc. shall be determined as "specially used" in general.

As for whether a certain product belongs to "specially used product", the right holder shall bear burden of proof.

120. Where one clearly knows that another party commits an act of patent infringement, and provides place, warehouse, transportation or other conveniences for the exploitation, the act of providing place, warehouse, transportation or other conveniences for the exploitation constitutes the act of assisting another party in committing the act of patent infringement as provided for in Article 118 of the Guidelines.

121. Where, without authorization of the patentee, one, for production or business purposes, actively induces another party to implement a specific technical solution by providing drawings, providing product specification, teaching technical solution, carrying out product demonstration, etc., with the actual occurrence of the commitment of patent infringement by the another party, the act of inducement of the actor constitutes the act of abetting another party in committing the act of patent infringement as provided for in Article 118 of the Guidelines.

122. Where the assignee/licensee of a technology assignment/license contract is assigned/licensed and exploits the technology as agreed in the contract, and infringes other’s patent right, the assignee/licensee shall bear the liability for infringement. Where the assignor/licensor clearly knows the technology in suit infringes other’s patent right and assigns/licenses the technology, the assignment/license act of the assignor/licensor shall be determined as constituting the act of abetting another party in committing the act of patent infringement as provided for in Article 118 of the Guidelines.

**VI. Defense of Patent Infringement**

123. The accused party's grounds of defense shall generally be provided before the termination of the court debate in the first instance with relevant supporting.

Where the accused party changes grounds of defense or makes new grounds of defense during the second instance and such grounds are accepted by the court of second instance and thus resulting a non-infringement decision, the party shall bear the official litigation fee and the other party's attorney fees, travel expenses and related costs.

**(I) Defense Based on Patent Validity**

124. If the accused party provides evidence and proves that the patent in suit has not been valid, has expired, or has been invalidated, the court may dismiss the case.

125. In patent infringement litigation, where the accused party defends on the grounds that the patent does not meet the requirement for grant and shall be invalidated, a request for invalidation shall be filed with the PRB.

(II) Defense Based on Abuse of Patent Right

126. If the accused party provides evidence and proves that the patentee has obtained the patent in bad faith, the court may reject the plaintiff's claim.

Where the patent is invalidated during legal proceedings of patent infringement, a decision on abuse of patent right shall not be readily rendered.

127. Acquisition of a patent in bad faith refers to applying for a patent for an invention-creation, which one clearly knows should not be granted patent protection, and finally obtaining patent right. Acquisition of a patent in bad faith includes following circumstance:

(1) Applying for and obtaining a patent for a technical solution of technical standards such as national standards, industry standards, etc. which the patentee clearly knows prior to the filling date;

(2) Applying for and obtaining a patent based on other's technical solution which is clearly learnt by the participants who draft and set technical standards such as national standards, industry standards, etc., ;

(3) Applying for and obtaining a patent for a product which the applicant knows being widely manufactured and used in a certain area;

(4) Fabricating experimental data, technical effects and other means to make the patent meet patentability requirements of the Patent Law and obtaining a patent;

(5) Applying for and obtaining a patent for a technical solution which is disclosed in a patent or patent application published abroad.

(III) Defense Based on Non-Infringement

128. As compared to all the technical features stated in the claim, when one or more technical feature of the claim is lacking among the technical features of the accused technical solution, the accused technical solution does not constitute patent infringement.

129. In the comparison of the technical features of the accused technical solution with all the technical features stated in the claim, when one or more technical features from the two technical solutions are found neither the same nor equivalent, the accused technical solution does not constitute patent infringement.

Following circumstances may be regarded as neither the same nor equivalent:

(1) This technical feature enables the accused technical solution to constitute a new technical solution;

(2) This technical feature is distinctly superior to the corresponding technical feature in the claim in respect of function and effect, and such change is regarded by a person with ordinary skills in the art as, instead of being obvious, containing substantial improvement;

(3) Where the accused technical solution leaves out an individual technical feature of the claim, or replaces a corresponding technical feature of the claim with a simpler or inferior technical feature, and abandons or notably reduces the performance or effect of the claim corresponding to this technical feature, and thus becomes an inferior technical solution.

130. Exploiting other's patent for personal use rather than for production or business purpose, does not constitute patent infringement.

(IV) Defense Based on Not Being Deemed as Infringement

131. After the patented product or the product directly obtained by the patented process is sold by the patentee or by an entity or individual under the authorization of the patentee, the act of using, offering to sell, selling or importing the product shall not be deemed as infringement of the patent right, with the following circumstances being included:

(1) After the patentee or its/his licensee sells within the territory of China its/his patented product or product directly obtained by the patented process, the purchaser uses, offers to sell, or sells the product within the territory of China;

(2) After the patentee or its/his licensee sells outside China its/his patented product or product directly obtained by the patented process, the purchaser imports the product into China and subsequently uses, offers to sell or sells the product within China;

(3) After the patentee or its/his licensee sells the specially adapted parts of the patented product, anyone uses, offers to sell or sells the parts or assembles them to make the patented product;

(4) After the patentee of the patented process or its/his licensee sells the equipment specially used for exploiting the patented process, anyone uses the equipment to exploit this process patent.

132. Where the same product has been made, the same process has been used, or necessary preparation has been made for the making or the use prior to the patent application date, and the making or the use only continues to be conducted within the original scope, such acts shall not be deemed as infringement of the patent right.

The use, offering to sell or sale of the patented product made in the abovementioned circumstances or the product directly obtained by the patented process shall not be deemed as infringement of the patent right, either.

133. The conditions for enjoying the right to prior use include:

(1) Necessary preparation for the making or the use has been made. That is, the principal technical drawings or process files essential for the exploitation of the invention-creation have been completed, or the principal equipment or raw materials essential for the exploitation of the invention-creation have been made or purchased.

(2) The making or the use only continues within the original scope. “The original scope” comprises: the production scale already existing prior to the date of patent application or the production scale possible to reach by means of or based on the available production equipment. The making or the use going beyond the original scope shall constitute infringement of the patent right.

(3) The prior made product or the prior used process or design should have been accomplished by independent research of the holder of prior right, or obtained by legitimate means from the patentee or other independent researcher and accomplisher, rather than being obtained by plagiarizing, stealing or other unfair means. The accused infringer’s defense on the grounds of the right to prior use to an illegally acquired technique or design shall not be supported.

(4) The holder of prior right may not transfer the technology it or he has prior exploited, unless it is transferred together with the affiliation. That is, where the holder of prior right transfers or licenses, after the date of patent application, the technology or design which it or he has exploited or prepared for exploiting, to others for exploitation, where the accused infringer claims that such exploitation belongs to continuation of exploitation within the original scope, such claim shall not be supported, provided that the technology or design is transferred or inherited together with the original enterprise.

134. The exploitation of the relevant patent in the equipment or device of a means of transport, which is a foreign means of transport temporarily passing through the territory, territorial waters or territorial air space of China, out of the needs of the transport means itself, complying with the treaty signed between the country it belongs to and China, or with the international treaty to which both countries have joined, or based on the principle of mutual benefit, shall not be deemed as infringement of the patent right. However, temporary crossing of the boarders does not include the “transshipment” of the patented product by means of transport, that is, the act of transferring from one means of transport to another.

135. Using the patent concerned solely for the purposes of scientific research and experimentation shall not be deemed as infringement of the patent right.

Solely for the purposes of scientific research and experimentation means that the scientific research and experimentation is solely conducted on the patented technical solution, the purpose of which is to study, verify and improve other’s patented technology, and to produce new technical achievements on the basis of the prior patented technology.

Using the patent concerned as provided for in the first paragraph of the current Article includes the researcher and experimenter’s own acts of making, using and importing the patented product and of using the patented process, and also other’ acts of making and importing the relevant patented product for the researcher and experimenter.

136. Where for the purposes of providing information required for the regulatory examination and approval, any person makes, uses or imports a patented medicine or a patented medical apparatus, and where any person makes or imports the patented medicine or the patented medical apparatus exclusively for such person, such acts shall be deemed as infringement of the patent right.

The information required by the regulatory examination and approval refers to the relevant materials such as experimental materials, study report, scientific literature, etc. that are provided for in the relevant laws and regulations, department rules, etc. on drug administration, including the Drug Administration Law of the People’s Republic of China, the Regulations for the Implementation of the Drug Administration Law of the People’s Republic of China, the Provisions for Drug Registration, etc.

(V) Defense Based on Prior Art and Prior Design

137. The defense based on the prior art means that where all the technical features accused of falling within the extent of protection of the patent are identical with or equivalent to the corresponding technical features of a prior technical solution, or where the accused technical solution is recognized by a person with ordinary skills in the art as a simple combination of a prior technique and the common knowledge in the art, the technology implemented by the accused infringer shall be deemed to belong to the prior art, and the act of the accused infringer does not constitute infringement of the patent right.

138. The prior art refers to any technology known to the public in China or abroad before the date of filling, which includes the technology that enters the public domain and can be freely used, and the technology that falls within the scope of patent of others and does not enter the public domain, and the prior patented technology owned by the patentee; however, the technology which enjoys the grace period of novelty according to Article 24 of Patent Law shall not be used as prior art for defense.

139. A defense based on the prior design means that where the accused design is identical with or similar to a prior design, or where the design incorporated by the accused product is a simple combination of a prior design and the usual design of this product, the accused design constitutes a prior design, and the act of the accused infringer does not constitute infringement of the patent for design.

140. The prior design refers to any design known to the public in China or abroad before the date of filing, including any design publicly disclosed in the form of publication, or by means of use, etc. in China or abroad.

141. In respect of a patent that is filed and granted pursuant to the provisions of the Patent Law before the 2008 amended Patent Law came into force, its prior art or prior design shall be determined in accordance with the provisions of the former version of Patent Law.

142. A conflicting application does not belong to the prior art or prior design, and may not serve as the grounds for a defense based on the prior art or prior design.　Where the accused infringer alleges that it or he has exploited a technical solution or design of a conflicting application, it may be handled with reference to Article 137 or 139 of the Guidelines.

143. To examine whether the defense based on the prior art is accepted, the technical features of the prior art should be compared with the technical features of the accused product to check whether the technical features are identical or equivalent, rather than be compared with the technical features of the patent in suit.

144. To examine whether the defense based on the prior design is accepted, the prior design should be compared with the accused design to check whether they are identical or similar, and the prior design should not be compared with the patent in suit.　However, where the accused design is identical or similar with the patent, and there is a minor visual difference between the accused design and the prior design, if the essential features of the design patent are used in the accused design, the defense based on the prior design cannot be accepted; otherwise, such defense can be established.

**(VI) Defense Based on Legitimate Source**

145. Whoever, for production or business purposes, uses or sells a patented product, when it did not know and should not know that the product was produced and sold without permission of the patentee, is not required to bear the liabilities for compensation provided that it or he can prove that the product was obtained from a legitimate source, but shall bear the legal liability for ceasing the using, offering to sell or selling infringing products, upon the right holder's request.

146. "Legitimate source" means procuring the infringing product through legitimate business channel, regular sales contract and other legitimate business modes.

With respect to legitimate source, the user of the accused product, the party offering to sell or selling the accused product shall provide relevant evidence in compliance with transaction practices, save that the patentee acknowledges the legitimate source.

**(VII) Defense for not stopping infringement**

147. Where an infringing product is used and the user does not know and should not know that such product is manufactured and sold without the permission of patentee, if the legitimate source of such products is proved and the accused infringer has proved that it or he executed reasonable consideration, a people's court shall not support the right holder's litigation claims on ceasing the aforesaid use of the infringing product.

148. Where the accused activity constitutes patent infringement but the stop of said accused activity will be detrimental to national or public interests, a people's court may rule that the accused infringer is ordered to pay reasonable royalties rather than ceasing accused patent infringement act.　Following circumstances may be deemed to be detrimental to national or public interests:

(1) be detrimental to China's political, economic, military and other security;

(2) may be detrimental to public safety;

(3) may endanger public health;

(4) may cause significant environmental protection pollution accidents;

(5) other circumstances that may lead to serious imbalances of other interests, such as serious waste of social resources.

149. In a case about a standard essential patent explicitly disclosed in　recommended national, industrial or local standards, if the patentee is intentionally in breach of its obligation for licensing on "fair, reasonable and non-discriminatory" terms as promised in the process of formulating the standards when the patentee and the accused infringer negotiate about the patent licensing conditions, thereby resulting in failure to reach a patent licensing contract and the accused infringer has no obvious faults in the negotiations, the courts generally shall not uphold the right holder’s claim for stopping the act of implementing the standards. Where a standard is not a recommended national, industrial or local standard, but belongs to international standard or a standard made by other standard setting organizations, if the patentee explicitly discloses the patent and makes a fair, reasonable, and non-discriminatory commitment according to the policy of the standard setting organizations, the above provision can be referred to.

To judge whether there is "explicitly" commitment should be in accordance with policies and regulations of the standard setting organizations and industry practices.

A standards-essential patent is a patent that claims an invention that must be used to comply with a technical standard.

150. In the negotiation for licensing standard essential patents, the negotiating parties should be in good faith. The patentee who makes fair, reasonable and non-discriminatory terms commitment shall fulfill the obligations under the statement; the accused party who requests the patentee to license on fair, reasonable and non-discriminatory terms should also diligently negotiate in good faith.

151. The patentee shall bear the burden of proof in the specific content of its fair, reasonable and non-discriminatory terms committed in formulating the standard, which may be proved by the following evidence:

(1) statement for licenses and patent information disclosure documents submitted by the patentee to the relevant standard setting organizations;

(2) the patent policy of the relevant standard setting organizations; (3) the commitments related to license publicly made by the patentee.

152. Where there is no evidence to prove that patentee willfully violates its obligation for licensing on fair, reasonable and non-discriminatory terms, and the accused party has no apparent fault in negotiation of license, if the accused party timely provides the royalty he alleged or guarantee which is not less than its alleged royalty, the court generally should refuse the patentee's request for ceasing infringement.

One of the following circumstances may be deemed as the patentee willfully violates its obligation for licensing on fair, reasonable and non-discriminatory terms:

(1) failing to notify the accused infringer of the infringement in written form and failing to specify the scope and the way of infringement;

(2) failing to provide patent information or provide specific conditions of license to the accused infringer in written form in accordance with business practices and trading practices, after the accused party explicitly express the willingness of accepting the license negotiation;

(3) failing to provide the accused infringer a period for reply in accordance with business practice and trading custom;

(4) obstructing or interrupting the negotiation without adequate reasons during the negotiation;

(5) proposing a clearly unreasonable condition during negotiation, which results in failure to reach a license agreement;

(6) the patentee has any other serious faults in the negotiation.

153. Where the patentee has not fulfilled its obligation for licensing on the fair, reasonable and non-discriminatory terms, and the accused party has serious fault in the negotiation, a people's court shall determine whether the patentee's request for ceasing infringement of a standard essential patent should be supported, after having analysis of the degree of fault between the parties and judgment on which party shall undertake the primary responsibility for the breakdown of the negotiation.

If any of the following acts is committed, it may be found that the accused infringer has a clear fault in the necessary patent licensing consultation process:

(1) failing to diligently respond within reasonable time after receiving written notification of infringement from the patentee;

(2) failing to diligently respond within reasonable time on whether to accept license conditions of the patentee; or refusing to accept specific conditions proposed by the patentee but failing to propose new conditions, after receiving specific conditions of license from the patentee;

(3) obstructing, delaying or refusing to participate in the license negotiation without adequate reasons;

(4) proposing a apparently unreasonable condition during negotiation, which results in failure to reach a license agreement;

(5) the accused infringer has any other serious faults in the negotiation.